Supreme Court, U. S.
FILED
AUG 1 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 73-1927

In the Matter of

MARCEL FREUDMANN,

Petitioner,

-against-

JOSEPH BLANKSTEIN,

Respondent.

PETITIONER'S REPLY BRIEF

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Since the filing of the petition for a writ of certiorari, Gurfein's J. decision has been reported in 495 F.2d, 816.

The brief submitted in opposition to the petition for a writ strays far from the record. The alleged losses mentioned on pages 3 and 4 and the many statements therein contained were rejected by Gurfein J. in his opinion, who found that the bankrupt did nothing improper; that he had deposited every dollar received from the sale of merchandise, in his business checking account, and used the money to pay creditors. Gurfein J. rejected the claim that any monies were diverted. In face of the foregoing, one wonders how the Trustee can, with good grace, make a contrary argument and assert that such fact issue was involved and resolved against the bankrupt below. Indeed, if fact issues

were present, they were resolved adversely to the Trustee by Gurfein J. and thus bare how erroneous the decision is denying a discharge.

On page 6, the Trustee crowns his inaccuracies by stating that:

> "Petitioner offered no proof whatever of adequate consideration."

Yet, Gurfein's J. opinion repeatedly states that the proof not only established that there was fair consideration for the merchandise sold, but that the Trustee failed completely in his endeavor to establish there was inadequate consideration there for as alleged in the objections. Thus, by a series of statements which are less than correct, the Trustee seeks to bait this Court into error and deny petitioner's right to a discharge.

The entire burden of the brief is that because petitioner sold merchandise at a loss in order to raise money to pay his creditors, it constitutes fraud and should bar the discharge. However, such is not the law. Sales made in order to enable one to pay his debts in the expectation that in so doing, he may continue in business, do not constitute a fraudulent transfer regardless of the fact that in the ultimate, it may have an adverse effect on creditors. *Tiffany v. Lucas,* 15 Wall 410, 21 L Ed. 198; *Richardson v. Germania Bank,* 263 F. 320 (2nd Cir. 1919).

In *Tiffany,* it was said:

> "It is for the interest of the community that everyone should continue his business, and avoid, if possible, going into bankruptcy; and yet how could this result be obtained if the privilege were denied a person who was

unable to command ready money to meet his debts as they fell due, of making a fair disposition of his property in order to accomplish this object?"

The criteria of determining whether actual intent to defraud is present, is not the lack of business acumen and good sense shown by the bankrupt in doing what he does. He may have been less than prudent, or overly confident, perhaps rash, but this does not create the ingredients necessary to establish intent to defraud as alleged in the objections filed to the discharge. Actual fraud in contradistinction to [illegible] types of fraud must be proven.

The multiple statements in the brief that memorandum merchandise was sold at a loss is without support in the record, and the Referee's second opinion rejected such claim. In sum, the more than fifteen transactions which the Trustee alludes to in his brief is at war with the decision of the District Court which held there were but fifteen.

The claim on page 7 of the Trustee's brief that the bankrupt allegedly withdrew $66,000 during the last 13 months of business operation is without support and was not found by Gurfein J. The withdrawals were used in the main to pay creditors, business and other debts. He sought to obtain financial assistance from his family and other sources from whom he had previously borrowed in the hope he could thereby weather the storm but this proved abortive. Moreover, the alleged withdrawals were not the basis for denying the bankrupt's discharge.

In a word, the bankrupt sought in every possible way to survive, struggling in a sea of financial distress. That he bought goods and then sold it at a loss in order to raise money to pay pressing creditors may constitute a preference, but it does not rise

to the level of fraud which should bar a discharge, especially in view of Gurfein's J. findings that the Trustee failed to establish that any of the merchandise was sold for an inadequate consideration or that the sales price was unfair. The foregoing findings completely demolish the Trustee's claim. The denial of the discharge herein constitutes a barring thereof on grounds not set forth in the Bankruptcy Act.

Respectfully submitted,

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